Supreme Court, U.S.
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No. 07-392

In The

Supreme Court of the United States

DARREN C. BLUEMEL,

Petitioner,

vs.

CLINT S. FRIEL AND MARK L. SHURTLEFF,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit substantially depart from accepted federal law in denying Petitioner a certificate of appealability where the record shows that Petitioner pleaded guilty to first-degree murder without any factual basis to establish *mens rea* and without a finding that Petitioner was competent to plead guilty?

2. Did the Tenth Circuit substantially depart from accepted federal law in denying Petitioner a certificate of appealability based on his § 2254 petition not being timely filed when the record establishes that the one-year statute of limitations under 28 U.S.C. § 2254 still to this day remains tolled because Petitioner's Motion to Amend was never ruled upon and is therefore still pending?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Darren C. Bluemel, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit entered on July 18, 2007.

ORDER BELOW

On July 18, 2007, the Tenth Circuit Court of Appeals filed its Order, pursuant to 28 U.S.C. § 2253(c)(2), finding that Petitioner filed his 28 U.S.C. § 2254 petition after the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996, hereinafter AEDPA, expired and thus denying Petitioner a Certificate of Appealability; the Order is attached herein as APPENDIX A.

JURISDICTION

On September 26, 2006, the district court filed its Memorandum Decision and Order dismissing Petitioner's § 2254 Petition. APPENDIX B. No Certificate of Appealability was issued by the district court nor was any mention made of it being denied. On November 2, 2006, Petitioner filed an application for a Certificate of Appealability with the Tenth Circuit Court of Appeals. On July 18, 2007, the Tenth Circuit Court of Appeals filed an Order denying Petitioner's

request. APPENDIX A. The Court of Appeals had jurisdiction pursuant to Title 28 U.S.C. § 2253(a) and it's Order denying a Certificate of Appealability was entered pursuant to 28 U.S.C. § 2253(c)(2). APPENDIX A.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."

United States Constitution, Fourteenth Amendment:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

On March 23, 1999, Petitioner (Mr. Bluemel) was arrested. On March 26, 1999, an information was filed charging Bluemel with murder, a first-degree felony; aggravated kidnapping, a first-degree felony; and tampering with evidence, a second-degree felony. He was arraigned on the information on March 29, 1999, and was appointed counsel – Attorney Salomon Chacon – from the Salt Lake Legal Defender Association to represent him. The preliminary hearing in this

murder, kidnapping and tampering with evidence case began on June 2, 1999. At the outset of the preliminary hearing, as Attorney Chacon would later state – "The Preliminary hearing wasn't two minutes old before he said: I want to plead guilty to this. I don't want to put anyone through this, my family, anybody's family." Based upon Mr. Bluemel's in-court sudden statements, the preliminary hearing was aborted and arraignment was set for June 11, 1999.

At the June 11, 1999, arraignment, Mr. Bluemel entered a guilty plea to murder. The sole factual basis for the guilty plea to murder, first-degree felony, was provided by Mr. Bluemel's appointed counsel as reflected in the transcript of preliminary sentencing and went as follows;

> Your Honor, on March the 23rd Penny Weaver (phonetic) called the police, 9-1-1, indicating that a shooting has taken place at the home of Mr. Bluemel and that Mr. Bluemel had shot Rachel Carolyn (phonetic). Subsequent investigation essentially revealed that and Mr. Bluemel has admitted that, and Ms. Carolyn died from those gunshot wounds.

At sentencing, the state court judge acknowledged that he had been acquainted with some background, generally, and specifically with Mr. Bluemel's "head injury" through letters from his family and friends. Despite acknowledgment of a "head injury" through letters from Mr. Bluemel's family, the Judge never inquired into the significance of Mr. Bluemel's multiple head injuries or the psychological problems

that had ensued for years as a result of those injuries and from n[illegible]al causes. The state court judge never mentioned having reviewed any psychological evaluation prior to sentencing and Attorney Chacon never mentions the results or occurrence of any such evaluation. A psychological evaluation, however, had in fact been performed prior to sentencing and the report that was produced revealed a history of serious psychological issues on the part of Mr. Bluemel.

The evaluation that the state court judge either never saw or simply never acknowledged was prepared on August 17, 1999, by Dr. Juan A. Mejia, Ph.D. Dr. Mejia had prepared a 'Confidential Psychological Evaluation' revealing that Mr. Bluemel suffered from major depressive disorder; antisocial personality disorder with narcissistic and paranoid features; and a history of head injuries, long-term alcohol dependence and exposure to paint solvents. The results of a personality test depicted Petitioner as confused, inefficient, irritable, impulsive, angry and emotionally liable. Dr. Mejia further noted that Petitioner had problems with organizing behavior, planning the day, showing good judgment and controlling emotions.

The Confidential Psychological Evaluation also revealed that Mr. Bluemel had had several psychiatric evaluations in the years preceding his spontaneous guilty plea, beginning in 1993. The Evaluation reported that Mr. Bluemel's Holy Cross Jordan Valley Hospital records included a diagnosis of depression in 1993; in 1996, Dr. Mendelsohn gave him a diagnosis

of antisocial personality disorder with narcissistic and paranoid features, with a provisional diagnosis of cognitive disorder not otherwise specified (postconcussional disorder). In 1996, Dr. Handrich gave him diagnoses of mood disorder on the basis of head injury and antisocial personality disorder as well as alcohol in remission. In 1996, Dr. Richter gave him diagnoses of major depression, recurrent, moderate; alcohol dependence; and organic brain syndrome due to prior head injury and long-term alcohol abuse.

Despite the thoroughness of Dr. Mejia's psychological evaluation, it appears that Mr. Chacon failed to direct Dr. Mejia to evaluate Mr. Bluemel's mental state at the time of the alleged murder, or whether Mr. Bluemel was *even capable* of pre-meditation – an absolute essential element in the charge of first-degree murder. The only specific request made by Mr. Chacon was "for an opinion regarding Mr. Bluemel's ability or limitations in terms of being able to remember what happened to the weapon involved in his crime."

In the long run, however, at sentencing Mr. Bluemel's psychological issues, his years worth of diagnoses and medication and Dr. Mejia's report were never even mentioned, nor apparently taken into consideration. It is not clear whether the Court was ever given the benefit of seeing the psychological evaluation or made aware of Mr. Bluemel's psychological issues or whether these issues were simply ignored. Ultimately, the trial court sentenced Mr. Bluemel to the maximum penalty available – an

indeterminate term of not less than 5 years to life. This sentence was essentially a life sentence.

It wasn't until after he was sentenced (when Mr. Bluemel was being weaned off his psychotropic medication) that Mr. Bluemel realized that he had pleaded guilty to murder and had been sentenced to essentially life in prison. At that time, he began to fight vigorously in an attempt to appeal his sentence or to withdraw his guilty plea. His family could not afford to hire an attorney for him and the Utah State Prison system does not provide inmates with a law library. Mr. Bluemel's only option, therefore, was to turn to the "contract attorneys" who are responsible for providing legal advice and assistance to inmates at the Utah State Prison. In January 2000, Mr. Bluemel met with a contract attorney – Mr. Angerhofer – for the first time. Mr. Angerhofer gave Mr. Bluemel a blank State Habeas Petition to be completed. Further, at Mr. Angerhofer's instruction, Mr. Bluemel wrote the court and requested copies of his medical files and transcripts from his preliminary sentencing and his sentencing hearings. The court did not release Mr. Bluemel's preliminary sentencing transcript until July 28, 2000.

Once he obtained the necessary documents, Mr. Bluemel created a crude and incomplete outline for his Habeas Petition and sent it to Mr. Angerhofer so that Mr. Angerhofer could conduct research, prepare the Petition in a way that was substantively and procedurally accurate and file it with the appropriate court. Instead, on August 25, 2000, Mr. Angerhofer

simply filed the rough outline for the petition given to him by Mr. Bluemel. Mr. Bluemel repeatedly attempted to obtain assistance from the contract attorneys to help him file an amended petition that was legally and procedurally correct, but to no avail. Therefore, in an attempt to do it on his own, Mr. Bluemel filed a simple Motion to Amend on December 1, 2000, and he wrote the court requesting the appointment of counsel. The court never responded to Mr. Bluemel's request for counsel and never ruled on his motion to amend. On December 11, 2000, the court dismissed the incomplete petition with prejudice concluding the petition was "facially without merit" for failing to state a cognizable claim upon which relief could be granted because it lacked sufficiently detailed allegations.

On January 19, 2001, Mr. Bluemel filed a second state habeas petition. Again, he was provided the forms to fill out, but no instructions or guidance from the contract attorneys. Between the time when the first and second petitions were filed, Mr. Bluemel had been transferred to a facility in Garfield County. Without an attorney or legal materials to tell him otherwise, Mr. Bluemel believed he needed to file his petition with the district court serving the county in which he was incarcerated. On March 2, 2001, the court dismissed Mr. Bluemel's petition since it was not properly filed in the right district.

Mr. Bluemel filed a third state petition for post-conviction relief on June 8, 2001. This petition was also denied. Mr. Bluemel then pursued this denial

through the appeals process. On December 2, 2003, the Utah Supreme Court denied certiorari.

Mr. Bluemel filed the instant petition for federal habeas relief on November 23, 2004. The district court denied Mr. Bluemel's petition on procedural grounds finding the petition was barred because it was filed outside of the one-year statute of limitations period provided for § 2254 petitions. Mr. Bluemel then filed an application for a Certificate of Appealability with the Tenth Circuit Court of Appeals on November 2, 2006. On July 18, 2007, the Tenth Circuit Court of Appeals filed an Order denying Petitioner's request.

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit substantially departed from accepted federal law in denying Petitioner a Certificate of Appealability where the record shows that Petitioner pleaded guilty to first-degree murder without any factual basis to establish *mens rea* and without a finding that Petitioner was competent to plead guilty.

In *Slack v. McDaniel,* 529 U.S. 473 (2000) this Court, *inter alia,* held;

> First, when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after April 24, 1996 (the effective date of AEDPA), the right to appeal is governed by the certificate of appealability

> (COA) requirements now found at 28 U.S.C. § 2253(c) (1994 ed., Supp. III). This is true whether the habeas corpus petition was filed in the district court before or after AEDPA's effective date.

Slack at 478. This Court further held;

> Second, when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack at 478. In this case, Mr. Bluemel satisfied these requirements but was nevertheless denied a Certificate of Appealability by the Tenth Circuit.

Here, Mr. Bluemel's request for a Certificate of Appealability came in a case, not only where he raised issues of a flawed plea to first-degree murder where no factual basis was ever established for the statutorily required *mens rea* element, but also a case where Mr. Bluemel was suffering from a number of unchecked psychological issues at the time of his guilty plea which calls into question the knowing and voluntary nature of his plea. These issues amounted to a

deprivation of Mr. Bluemel's Fifth and Fourteenth Amendment due process rights.

Federal Rules of Criminal Procedure 11(b)(3) establishes that – "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." This Court has recognized the need for compliance with Rule 11 time and again. For example, see *Santobello v. New York*, 404 U.S. 257, 261 (1971) – "Fed. Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge."

Utah Criminal Code § 76-2-101 holds that – "A person is not guilty of an offense unless the person's conduct is prohibited by law; and (b)(i) *the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires.*" [Emphasis added] *Utah Criminal Code* § 76-5-203 charges that a homicide constitutes murder where the person charged "*intentionally or knowingly causes the death of another.*" [Emphasis added] No such finding was ever made by the trial court or admitted by Mr. Bluemel. *Mens rea* – whether intentional, knowing, accidental, under a fog of recklessness or drunkenness – was never even discussed at the time of Mr. Bluemel's spontaneous change of plea or at his sentencing.

Instead we have a man that spontaneously decided to plead guilty to first-degree murder without meaningfully discussing this option first with his attorney; a man who was allowed to plead guilty by his trial attorney and the Court without questioning Mr. Bluemel as to whether he understood the proceedings he was involved in or the consequences of his actions; and a man who had years of documented psychological issues – known to his trial attorney at a minimum, known by both his attorney and the Court at maximum – but who was never questioned or evaluated regarding his state of mind at the time of the alleged murder to determine if he even *had the capacity* to *knowingly* or *intentionally* cause the death of another.

It is well-settled law that a mentally incompetent person may not be convicted of a crime without first having a proper evaluation performed to assure that the accused is aware of the proceedings before him. This very Court has held – "The conviction of an accused person while he is legally incompetent violates due process and state procedures must be adequate to protect this right." *Pate v. Robinson,* 383 U.S. 375, 378 (1966) citing *Bishop v. United States,* 350 U.S. 961 (1956). "While [Petitioner's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." *Id.* at 386.

Regarding mental competency hearings, this Court held in *Dusky v. United States,* 362 U.S. 402 (1960);

> A Federal District Court, acting under the statute 18 U.S.C. § 4244 permitting a federal court in which criminal proceedings are pending to make a finding regarding the mental competency of the accused to stand trial, may not make a determination that an accused is mentally competent merely because he is oriented to time and place and has some recollection of events; the test must be whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.

Here, there was an overwhelming wealth of information before the Court and Mr. Bluemel's trial attorney suggesting that Mr. Bluemel was mentally ill and very likely incompetent to enter a spontaneous plea of guilty to first-degree murder, yet the state court never ordered a psychological evaluation or competency hearing. Nor did the state court ever inquire to Mr. Chacon whether such an evaluation had been performed or what the results showed. Instead, Mr. Bluemel was permitted to enter a plea of guilty without question and without a finding of *mens rea* only for Mr. Bluemel to realize what he had done later, when it was too late. This was a violation of Mr. Bluemel's due process rights under the Fifth and Fourteenth Amendments and therefore, the Tenth Circuit should have issued Mr. Bluemel a Certificate of Appealability.

2. The Tenth Circuit substantially departed from accepted federal law in denying Petitioner a Certificate of Appealability based on his § 2254 petition not being timely filed when the record establishes that the one-year statute of limitations under 28 U.S.C. § 2254 still to this day remains tolled because Petitioner's Motion to Amend was never ruled upon and is therefore still pending.

In the case *Artuz v. Bennett*, 531 U.S. 4 (2000), a New York trial court orally denied Respondent's motion to vacate his state conviction filed in 1995. Respondent never received a copy of the written order reflecting the denial. Three years later Respondent filed a petition for a federal writ of habeas corpus in the United States District Court for the Eastern District of New York. The District Court summarily dismissed the petition as untimely under AEDPA. The Second Circuit reversed and remanded finding, *inter alia*, that "in the absence of a written order, the accused's 1995 motion was still pending under 2244(d)(2)." *Artuz* at 6. Since Respondent's 1995 motion was still "pending," the AEDPA remained tolled and his 1998 petition for a federal writ of habeas corpus was deemed timely filed.

This Court affirmed the holding of the Second Circuit Court of Appeals, adopting by implication its reasoning that;

> Respondent had not yet received a written order denying his 1995 motion to vacate the conviction. Since Respondent could not

> appeal the denial absent such written order; and since, in the panel's view, "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures," [*Bennett v. Artuz*, 199 F.3d 116, 120 (2nd Cir. 1999)]; the panel concluded that Respondent's 1195 motion was still "pending" for purposes of § 2244(d)(2).

Artuz at 7. See also – *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005) for this Court's latest interpretation of *Artuz*.

In the case at bar, the scenario from *Artuz* repeats itself. The record establishes that Mr. Bluemel filed his "Motion to Amend" with the Third District Court on December 1, 2000. That was only a few days after the State of Utah filed its Answer to the Third District Court Petition, but before the state court filed the Order of Dismissal. Mr. Bluemel, like Respondent in *Artuz*, never received a written order either granting or denying his "Motion to Amend." Like Mr. Bluemel's letter to the court requesting appointment of counsel, filed with the Third District Court on November 27, 2000, his Motion to Amend went unheard. For purposes of the AEDPA, since Mr. Bluemel's Motion to Amend has never been ruled upon, his Motion to Amend is still pending and the statute of limitations remains tolled. Thus Mr. Bluemel's petition was timely filed.

CONCLUSION

For the foregoing reasons, Mr. Bluemel prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: September 19, 2007

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DARREN C. BLUEMEL,

Petitioner-Appellant,

v.

CLINT S. FRIEL, Warden and MARK L. SHURTLEFF, Attorney General,

Respondents-Appellees.

No. 06-4271

District of Utah

(D.C. No. 2:04-CV-1082 TC)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BRISCOE**, **McKAY**, and **McCONNELL**, Circuit Judges.

(Filed July 18, 2007)

Darren Bluemel, a state prisoner, seeks a certificate of appealability (COA) that would allow him to appeal from the district court's order denying his habeas corpus petition under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A). Because we conclude that Mr. Bluemel filed his petition after the one-year statute of limitations expired, we deny his request for a COA and dismiss the appeal. *Id.* § 2253(c)(2).

Background

On June 11, 1999, Mr. Bluemel pleaded guilty in Utah state court to first-degree murder. He was represented by court-appointed counsel. At sentencing on August 30, 1999, he received the maximum sentence under state law at the time: an indeterminate sentence of five years to life in prison. The record indicates that, when Mr. Bluemel pleaded guilty and was sentenced, he was taking antidepressants due to a head injury he had suffered some five years earlier.

Because Mr. Bluemel did not appeal his conviction, it became final on September 29, 1999, the deadline under state law for filing an appeal. On August 25, 2000, Mr. Bluemel – then proceeding *pro se* – filed his first petition for state post-conviction relief. The state district court denied this petition on December 11, 2000. Mr. Bluemel did not appeal that dismissal within the thirty-day deadline, which expired on January 11, 2001. He filed a second state petition for post-conviction relief on January 19, 2001, which the state court denied on March 2, 2001. Mr. Bluemel again failed to appeal that decision within the thirty days allotted for doing so, or before April 2, 2001.

Mr. Bluemel filed a third state petition for post-conviction relief on June 8, 2001. After this petition was denied, Mr. Bluemel pursued it through the appeals process, which ended on December 2, 2003, when the Utah Supreme Court denied certiorari.

Mr. Bluemel filed this petition for federal habeas relief on November 23, 2004. The district court denied Mr. Bluemel's petition on procedural grounds, holding that the petition was barred because it was filed outside of the one-year statute of limitations period in 28 U.S.C. § 2244(d). The court rejected Mr. Bluemel's contention that the limitations period should be tolled on statutory and equitable grounds. Mr. Bluemel now requests a COA from this Court.

Discussion

The denial of a motion for relief under 28 U.S.C. § 2254 may be appealed only if the district court or this Court first issues a COA. 28 U.S.C. § 2253(c)(1)(A). A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When a court denies a habeas petition on procedural grounds without reaching the underlying constitutional claim, as the district court did in this case, "a COA should issue when the prisoner shows . . . that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). We find the district court's procedural ruling correct and therefore dismiss the petition.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of

limitations on habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). This limitation period is tolled while properly filed applications for state post-conviction relief or other collateral review are pending. *Id.* § 2244(d)(2). AEDPA's statute of limitations is also subject to equitable tolling in cases where extraordinary circumstances outside of the prisoner's control lead to delay in filing. *See Marsh v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000). Mr. Bluemel argues that he qualifies for both statutory and equitable tolling. He is mistaken.

The district court properly found that the one-year limitations period had expired long before Mr. Bluemel filed this § 2254 petition. Three-hundred thirty-one days of the 365-day allotment had already passed when Mr. Bluemel first sought post-conviction relief in state court on August 25, 2000. Thereafter, the limitations period was tolled while Mr. Bluemel's first and second state petitions for post-conviction relief were "pending" – i.e., after the petitions were filed and before the time for appealing the resolved petitions expired. *See* 28 U.S.C. § 2244(d)(2); *Carey v. Saffold,* 536 U.S. 214, 220 (2002). The thirty-four days remaining in his limitations period ticked away while no petition was pending and expired no later than April 29, 2001. Thus, Mr. Bluemel's November 2004 § 2254 petition fell outside AEDPA's statute of limitations by at least three and a half years. And the fact that Mr. Bluemel filed a third state petition for post-conviction relief on June 8, 2001, does not change our analysis. This third petition was filed

more than one month after the limitations period had expired, so there was nothing left for the June 8 petition to toll.

Mr. Bluemel, however, argues that the limitations period is tolled to this day because the state district court that heard his first petition for post-conviction relief did not rule on a motion to amend, which he filed before the court dismissed his claim. But the limitations period is tolled only while "a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies." *Barnett v. Lemaster,* 167 F.3d 1321, 1323 (10th Cir. 1999). It is not proper use of court procedure for Mr. Bluemel to neglect to appeal his post-conviction petition and then challenge the state district court's failure to rule on an outstanding motion three and a half years later in a § 2254 proceeding. Rather, Mr. Bluemel should have attacked the state court's failure to rule on his motion in an appeal to the Utah courts. Under AEDPA, tolling stopped as soon as the time for appealing the denied petition expired; at that moment, the petition was no longer pending. *See Carey* 536 U.S. at 220; *Barnett,* 167 F.3d at 1323 (internal citations omitted). Thus, the judgment on Mr. Bluemel's first post-conviction petition became final, not withstanding the outstanding motion to amend, on January 11, 2001, the deadline to appeal.

Finally, we turn to Mr. Bluemel's claim that the limitations period was equitably tolled because (1) he was denied access to a law library, (2) the Utah State Prison contract attorneys refused to help, (3) the

contract attorneys provided erroneous advice, (4) he was acting *pro se,* (5) he is mentally disabled, (6) the state refused him access to his court file, and (7) state incarceration officials confiscated his accumulated legal materials.

One dispositive factor leads us to reject these claims. During the time for which Mr. Bluemel seeks equitable tolling, he filed three petitions for state post-conviction relief and a separate civil suit against the state of Utah challenging the prison policy on access to attorneys and law libraries. Equitable tolling excuses a late habeas petition only when a prisoner (1) "has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo,* 544 U.S. 408 (2005); *see also Marsh,* 223 F.3d at 1220. Mr. Bluemel's litigation work while incarcerated shows that he was able to pursue legal remedies despite the circumstances he claims prevented a timely § 2254 petition. *See Gaston v. Palmer,* 417 F.3d 1030, 1034-35 (9th Cir. 2005) (rejecting the petitioner's argument for equitable tolling because he was able to file timely state habeas petitions). In other words, Mr. Bluemel's own efforts show that there was no "extraordinary circumstance" preventing him from timely filing a § 2254 petition.

Conclusion

Accordingly, we **DENY** Mr. Bluemel's request for a COA and **DISMISS** this appeal.

Entered for the Court,

Michael W. McConnell
Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

DARREN C. BLUEMEL, Plaintiff, vs. CLINT FRIEL, et al., Defendants,	MEMORANDUM DECISION AND ORDER DISMISSING §2254 PETITION AND DENYING MOTIONS Case No. 2:04-CV-1082 TS

Petitioner, Darren C. Bluemel, an inmate at Utah State Prison, requests habeas corpus relief.[1] Because Petitioner has filed his petition past the applicable period of limitation, the Court denies his petition.

Petitioner's state judgment of conviction for murder with a five-years-to-life sentence was entered August 30, 1999. His conviction became final on September 29, 1999 – the deadline he missed for filing an appeal. On that date, the one-year period of limitation began running on Petitioner's right to bring a federal habeas petition. Even so, Petitioner waited until November 23, 2004, to file his current petition.

By statute, the one-year period of limitation is tolled for "[t]he time during which a properly filed

[1] *See* 28 U.S.C.S. § 2254 (2006).

application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[2] Meanwhile, equitable tolling is also available but "'only in rare and exceptional circumstances.'"[3]

Regarding statutory tolling, at separate times, Petitioner filed three different petitions for post-conviction relief in state court. After 331 days of the federal period of limitation had ticked away, on August 25, 2000, Petitioner filed his first state post-conviction petition. This petition was dismissed on December 11, 2000, and not appealed. January 10, 2001 was the last day Petitioner could have filed a notice of appeal. Another eight days ticked away (making a total of 339 days gone by), when the second state post-conviction petition was filed on January 19, 2001. This second petition was dismissed on March 2, 2001, and not appealed.[4] April 2, 2001 was the last day Petitioner could have filed a notice of appeal. The federal period of limitation of 365 days expired, at the latest, on April 29, 2001.

By the time Petitioner filed this federal petition on November 23, 2004, he had exceeded the period of limitation by more than three-and-a-half years.

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[2] *Id.* § 2244(d)(2).

[3] *Stanley v. McKune*, No. 05-3100, 2005 U.S. App. LEXIS 9872, at *4 (10th Cir. May 23, 2005) (quoting *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000)).

[4] The Court assumes without deciding that this petition was properly filed.

It is true that a third petition was filed on June 8, 2001. This petition was dismissed, then taken through the appeals process, which ended on December 2, 2003, with the denial of Petitioner's petition for writ of certiorari to the Utah Supreme Court. However, that proceeding is irrelevant to this analysis because it was not filed until after Petitioner's federal time limit had already expired. "[A] state court petition . . . that is filed following the expiration of the federal limitations period 'cannot toll that period because there is no period remaining to be tolled.'"[5]

Petitioner excuses his failure to timely file his petition by asserting he lacked access to a law library and other resources, has no legal education or training, has brain damage and mental illness, was transferred to another facility without his legal materials for a period, and he was just generally excusably neglectful. Based on these circumstances, he argues that the Court should apply equitable tolling to rescue him from the period of limitation's operation.

"Equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time."[6]

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[5] *Tinker v. Moore*, 244 F.3d 1331, 1333 (11th Cir. 2001) (quoting *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000)); *see also Fisher v. Gibson*, 262 F.3d 1135, 1142-43 (10th Cir. 2001).

[6] *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288 (9th Cir. 1997) (citation omitted).

Those situations include times "'when a prisoner is actually innocent'" or "'when an adversary's conduct – or other uncontrollable circumstances – prevents a prisoner from timely filing, or when a prisoner actively pursues judicial remedies but files a defective pleading during the statutory period.'"[7] And, Petitioner "has the burden of demonstrating that equitable tolling should apply."[8]

Against the backdrop of these general principles, the Court considers Petitioner's specific arguments. First, Petitioner asserts that his lateness should be overlooked because he lacked a law library, legal training, and had only limited help from prison contract attorneys. The argument that a prisoner "had inadequate law library facilities" does not support equitable tolling.[9] Further, it is well settled that "'ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing.'"[10]

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[7] *Stanley*, 2005 U.S. App. LEXIS 9872, at *4 (quoting *Gibson*, 232 F.3d at 808 (citation omitted).

[8] *Lovato v. Suthers*, No. 02-1132, 2002 U.S. App. LEXIS 14371, at *5 (10th Cir. July 15, 2002) (unpublished).

[9] *McCarley v. Ward*, Nos. 04-7114, 04-7134, 2005 U.S. App. LEXIS 14335, at *3-4 (10th Cir. July 15, 2005) (unpublished); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) ("It is not enough to say that the ... facility lacked all relevant statutes and case law or that the procedure to request specific materials was inadequate.").

[10] *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000).

Next, Petitioner's arguments regarding his mental capacity must fail because they do not involve an external situation. Simply put, Petitioner's mental status does not implicate an "exceptional circumstance" supporting equitable tolling.[11]

Third, as to Petitioner's argument that a transfer to another facility disrupted his ability to pursue his habeas claims and deprived him of his legal materials for a time, Petitioner does not state how this could possibly account for the many years of failing to pursue his claims in federal court. This argument thus fails. Finally, Petitioner's assertion of excusable neglect is unavailing. After all, the Tenth Circuit has held that "[s]imple excusable neglect is not sufficient" to trigger equitable tolling.[12]

During the running of the federal period of limitation and three-and-a-half years beyond, Petitioner took no steps himself to "diligently pursue his federal claims." In fact, all Petitioner's excuses are undercut by the fact that he was able to file and pursue to finality three state post-convictions between the time of his conviction and the time he filed this federal habeas petition. In sum, none of the

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[11] *See McCarley*, 2005 U.S. App. LEXIS 14335, at *3-4 (holding assertion of brain damage did not warrant equitable tolling); *Biester v. Midwest Health Srvs., Inc.*, 77 F.3d 1264, 1268 (10th Cir. 1996) ("[T]he Tenth Circuit has never held that mental incapacity tolls the statute of limitations.").

[12] *Gibson*, 232 F.3d at 808.

circumstances raised by Petitioner rendered it beyond his control to timely file his petition here.

Accordingly, the current petition before the Court was filed past the one-year period of limitation. And, it appears neither statutory exceptions nor equitable tolling apply to save Petitioner from the period of limitation's operation. It is therefore

ORDERED that this petition is DENIED because it is barred by the applicable period of limitation. It is further

ORDERED that all pending motions are DENIED as moot. The clerk of court is directed to close this case.

DATED September 26, 2006.

BY THE COURT:

/s/ Ted Stewart
TED STEWART
United States District Judge